

E-filing
Milton J. Lewis, T48953
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95531

ORIGINAL

FILED
08 MAY -6 PM 4:20
RICHARD W. BUCKING
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Petitioner, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILTON LEWIS, JR.,

Petitioner,

v.

ROBERT HOREL, Warden,
Pelican Bay State Prison,

Respondent.

No. 2337

CW

(PR)

**APPLICATION FOR APPOINTMENT OF COUNSEL;
SUPPORTING DECLARATIONS; AND PROPOSED ORDER**

APPLICATION FOR APPOINTMENT OF COUNSEL

Milton Lewis respectfully requests this Court to appoint counsel to represent him on his accompanying Petition for Writ of Habeas Corpus (28 U.S.C. § 2554), pursuant to 18 U.S.C. § 3006(a)(2)(B) and Rule 8(c) of the Rules Governing § 2254 Cases. This application is supported by the attached declarations of Mr. Lewis himself and of his state appellate counsel, L. Richard Braucher, who has assisted Mr. Lewis in preparing these papers and who is ready to accept appointment for this federal habeas proceeding.

Appointment of counsel is necessary "in the interest of justice" (Rule 8(c), *supra*), in light of the severity of Mr. Lewis's sentence of 22 years, four months in state prison (cf. *Hitchcock v. Eyman*, 418 F.2d 1245 (9th Cir. 1969)) and the difficulty of this inmate "to articulate his claims pro se in light of the

1 complexity of the legal issues involved” (*Weygandt v. Look*, 718 F.2d 952 (9th
2 Cir. 1983), emphasis added). As reflected in the accompanying Memorandum
3 of Points & Authorities (which was drafted for petitioner by his previous state
4 appellate counsel), adjudication of petitioner’s claims requires analysis of
5 complex state law and federal standards concerning (1) a prosecutor’s
6 questioning and argument about petitioner’s failure to demand a lineup, in
7 effect, asked the jury to use petitioner’s silence against him and improperly
8 shifted the burden of proof, as error under *Doyle v. Ohio* (1976) 426 U.S. 610
9 and *Griffin v. California* (1965) 380 U.S. 609; (2) the trial court erred in
10 permitting the prosecutor to exercise a peremptory challenge against the sole
11 prospective African-American juror solely on the basis of presumed group
12 bias, violating petitioner’s constitutional right to equal protection under *Batson*
13 *v. Kentucky* (1986) 476 U.S. 79; (3) the trial court illegally imposed the
14 aggravated term in petitioner’s case, in violation of the Sixth and Fourteenth
15 Amendments to the United States Constitution and *Blakely v. Washington* and
16 *Cunningham v. California*.

17 Appointment of counsel will serve the interests of judicial economy as
18 well. Prior state appellate counsel is already fully familiar with the record in
19 this case and with the legal claims. Consequently, appointment of counsel at
20 this stage would not require a new attorney to “get up to speed” on the case.

21 For all these reasons, Milton Lewis asks this Court to appoint counsel
22 to ensure full development and briefing of the complex issues surrounding his
23 case.

24 Dated: April 30, 2008

Respectfully submitted,

25
26 Milton Lewis
Milton Lewis
27 Petitioner, pro se
28

**DECLARATION OF MILTON LEWIS IN SUPPORT
OF APPLICATION FOR APPOINTMENT OF COUNSEL**

I, Milton Lewis, declare:

1. I am serving a sentence of 22 years, four months for Humboldt County Superior Court convictions of two counts of assault with a semiautomatic firearm (Pen. Code¹, § 245(b)) with two personal use of a firearm (§ 12022.5 (a)) enhancements. *People v. Milton Lewis, Jr.*, Case No. A098387.
2. On March 30, 2004, the First District Court of Appeal for the State of California affirmed my conviction and sentence in *People v. Milton Lewis, Jr.*, Case No. A098387, and the California Supreme Court denied my petition for review on June 30, 2004. The California Supreme Court finally denied a habeas claim based on *Blakely v. Washington* and *Cunningham v. California* on April 9, 2008.
3. I want to seek federal habeas corpus review of the constitutional issues surrounding the conviction in my case. However, I am not a "writ writer." I do not have any experience with presenting legal arguments. I do not believe that I have the ability to adequately present my claims on my own or to respond to any counter-arguments from the state Attorney General.
4. L. Richard Braucher, a Staff Attorney with the First District Appellate Project, was appointed to represent me on my state appeal. Although Mr. Braucher's appointment ended with the denial of state Supreme Court review, I asked Mr. Braucher if he could assist me in filing my habeas claims in federal court.

¹

All references to "Pen. Code" or "Penal Code" are to the California Penal Code.

**DECLARATION OF L. RICHARD BRAUCHER IN SUPPORT OF
APPLICATION FOR APPOINTMENT OF COUNSEL**

I, L. RICHARD BRAUCHER, declare:

1. I am a member of the State Bar of California (Bar No. 173754). I am admitted to practice before the U.S. District Court for the Northern District of California, the U.S. Courts of Appeal for the Ninth Circuit and for the Federal Circuit, and the U.S. Supreme Court.
2. I am a staff attorney with the First District Appellate Project (FDAP). FDAP is the non-profit agency which administers the appointment-of-counsel process for indigent criminal appeals in California's First Appellate District. FDAP staff attorneys provide both direct representation in criminal appeals and also provide panel attorneys with consultation, supervision, and other assistance in appeals assigned to the panel.
3. In my capacity as a FDAP staff attorney, I was appointed to represent Milton Lewis in his appeal from his sentence of 22 years, four months for his Humboldt County Superior Court convictions of two counts of assault with a semiautomatic firearm (Pen. Code¹, § 245(b)) with two personal use of a firearm (§ 12022.5 (a)) enhancements *People v. Milton Lewis, Jr.*, Case No. A098387.
4. As reflected in the accompanying Memorandum of Points & Authorities (which I drafted for petitioner), adjudication of petitioner's claims requires analysis of complex state law and federal

¹

All references to "Pen. Code" or "Penal Code" are to the California Penal Code.

standards concerning: (1) a prosecutor's questioning and argument about petitioner's failure to demand a lineup, in effect, asked the jury to use petitioner's silence against him and improperly shifted the burden of proof, as error under *Doyle v. Ohio* (1976) 426 U.S. 610 and *Griffin v. California* (1965) 380 U.S. 609; (2) the trial court erred in permitting the prosecutor to exercise a peremptory challenge against the sole prospective African-American juror solely on the basis of presumed group bias, violating petitioner's constitutional right to equal protection under *Batson v. Kentucky* (1986) 476 U.S. 79; (3) the trial court illegally imposed the aggravated term in petitioner's case, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and *Blakely v. Washington* and *Cunningham v. California*.

5. My state court appointment to represent Mr. Lewis was limited to direct review in the California courts and terminated with the California Supreme Court's denial of review. However, Mr. Lewis has requested my assistance in seeking federal habeas review. Although it is beyond the scope of my state appointment, I have drafted the enclosed Petition for Writ of Habeas Corpus and supporting Memorandum of Points & Authorities for Mr. Lewis to file in pro se. As discussed below, I am requesting that this Court appoint me or another attorney to represent Mr. Lewis on this petition.
6. I do not believe that Mr. Lewis can adequately articulate and present those claims to this Court (and respond to the state's arguments) in pro se. He does not have any experience as a "writ writer." Although the accompanying papers are being filed in pro se, I drafted the Petition and Memorandum of Points & Authorities for

1 Mr.Lewis's signature.

2 7. The assistance of counsel is essential in this case because the issues
3 are complex discussed in the accompanying Memorandum of Points
4 & Authorities.

5 8. By this declaration, I am requesting that the Court appoint me, or
6 another attorney, to represent Mr. Lewis on this habeas corpus
7 petition in the interests of justice, pursuant to 18 U.S.C. §
8 3006(a)(2)(B) and Rule 8(c) of the Rules Governing § 2254 Cases.
9 I am already very familiar with the underlying facts of this case and
10 with the applicable legal principles—both the substantive state law
11 and the relevant federal constitutional standards. Consequently, an
12 appointment would also serve “judicial economy” because I would
13 not need to “get up to speed” on the case.

14 9. I am an experienced state appellate attorney. I have handled a
15 federal habeas before, my colleagues have much federal habeas
16 experience and regularly represent clients in federal court.
17 Consequently, I believe I have the necessary familiarity with both
18 California substantive law and can avail myself of assistance with
19 federal habeas issues, when needed, to represent Mr. Lewis
20 competently on this petition.

21 10. The interests of justice support appointment-of-counsel to ensure
22 adequate presentation of these claims.

23 11. For these reasons, I respectfully request that the Court grant Mr.
24 Lewis's appointment-of-counsel request and designate me, or
25 another attorney, to represent him in this proceeding. If I am
26 appointed, I also request that the Court appoint me nunc pro tunc to
27 include my drafting of the accompanying Petition and Memorandum
28 of Points & Authorities on Mr. Lewis's behalf. A proposed order is

1 attached.

2
3 I declare under penalty of perjury the foregoing is true and correct.
4 Executed this 21st day of April, 2008, at San Francisco, California.

5
6
7
8 
L. RICHARD BRAUCHER

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

3 **MILTON LEWIS, JR.,**

4) No. _____
5) Petitioner,
6) v.

7 **ROBERT HOREL, Warden,**
8 **Pelican Bay State Prison,**

9 **Respondent.**
10 _____

11 **(PROPOSED) ORDER APPOINTING COUNSEL**
12

13 Good cause appearing, the Court finds that appointment of counsel is
14 appropriate in the interests of justice, pursuant to 18 U.S.C. § 3006(a)(2)(B)
15 and Rule 8(c) of the Rules Governing § 2254 Cases. Petitioner Milton
16 Lewis's application for appointment of counsel is hereby granted. The
17 attorney designated below is appointed nunc pro tunc to represent
18 petitioner, including preparation of the Petition, Memorandum of Points &
19 Authorities, and other supporting papers, and all further proceedings in this
20 matter:

21 **L. RICHARD BRAUCHER**
22 Staff Attorney
23 First District Appellate Project
24 730 Harrison Street, Suite 201
25 San Francisco, California 94107
26 415-495-3119

27 **IT IS SO ORDERED.**

28 _____, 2008

Judge, U.S. District Court

DECLARATION OF SERVICE

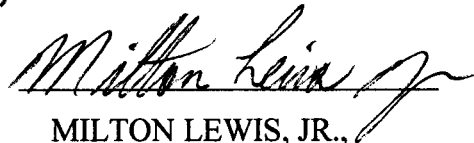
Case Name: MILTON LEWIS, JR., v. ROBERT HOREL, Warden,
Pelican Bay State Prison,;

On April 30, 2008, I served a true copy of the attached
APPLICATION FOR APPOINTMENT OF COUNSEL; SUPPORTING
DECLARATIONS; AND PROPOSED ORDER on each of the following, by
placing the same in an envelope addressed as follows:

Jerry Brown
Attorney General
455 Golden Gate Blvd., Suite 11000
San Francisco, CA 94102-3664

Each envelope was then sealed and deposited in the regular out-going
inmate mail at Pelican Bay State Prison in Crescent City, California, with the
postage thereon fully prepaid.

I declare under penalty of perjury of the laws of the State of California that
the foregoing is true and correct. Executed on April 30, 2008, at
Crescent City, California.


MILTON LEWIS, JR.,